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OPINION ON THE CONSTITUTIONALITY OF THE BILL FOR ESTABLISHING A NATIONAL BANK, 15 FEBRUARY 1791

Opinion on the Constitutionality of the Bill for Establishing a National Bank

The bill for establishing a National Bank undertakes, among other things

1. to form the subscribers into a Corporation.
2. to enable them, in their corporate capacities to receive grants of land; and so far is against the laws of *Mortmain*.^{*}
3. to make *alien* subscribers capable of holding lands, and so far is against the laws of *Alienage*.
4. to transmit these lands, on the death of a proprietor, to a certain line of successors: and so far changes the course of *Descents*.
5. to put the lands out of the reach of forfeiture or escheat and so far is against the laws of *Forfeiture and Escheat*.
6. to transmit personal chattels to successors in a certain line: and so far is against the laws of *Distribution*.
7. to give them the sole and exclusive right of banking under the national authority: and so far is against the laws of *Monopoly*.
8. to communicate to them a power to make laws paramount to the laws of the states: for so they must be construed, to protect the institution from the controul of the state legislatures; and so, probably they will be construed.

I consider the foundation of the Constitution as laid on this ground that ‘all powers not delegated to the U.S. by the Constitution, not prohibited by it to the states, are reserved to the states or to the people’ [XIIth. Amendmt.]. To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless feild of power, no longer susceptible of any definition.

The incorporation of a bank, and other powers assumed by this bill have not, in my opinion, been delegated to the U.S. by the Constitution.

I. They are not among the powers specially enumerated, for these are

1. A power to *lay taxes* for the purpose of paying the debts of the U.S. But no debt is paid by this bill, nor any tax laid. Were it a bill to raise money, it’s origination in the Senate would con demn it by the constitution.
2. ‘to borrow money.’ But this bill neither borrows money, nor ensures the borrowing it. The proprietors of the bank will be just as free as any other money holders, to lend or not to lend their money to the public. The operation proposed in the bill, first to lend them two millions, and then borrow them back again, cannot change the nature of the latter act, which will still be a payment, and not a loan, call it by what name you please.
3. ‘to regulate commerce with foreign nations, and among the states, and with the Indian tribes.’ To erect a bank, and to regulate commerce, are very different acts. He who erects a bank creates a subject of commerce in it’s bills: so does he who makes a bushel of wheat, or digs a dollar out of the mines. Yet neither of these persons regulates commerce thereby. To erect a thing which may be bought and sold, is not to prescribe regulations for buying and selling. Besides; if this was an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every state, as to it’s external. For the power given to Congress by the Constitution, does not extend to the internal regulation of the commerce of a state (that is to say of the commerce between citizen and citizen) which remains exclusively with it’s own legislature; but to it’s external commerce only, that is to say, it’s commerce with another state, or with foreign nations or with the Indian tribes. Accordingly the bill does not propose the measure as a ‘regulation of trade,’ but as ‘productive of considerable advantage to trade.’

Still less are these powers covered by any other of the special enumerations.

II. Nor are they within either of the general phrases, which are the two following.

1. ‘To lay taxes to provide for the general welfare of the U.S.’ that is to say ‘to lay taxes *for the purpose* of providing for the general welfare’. For the laying of taxes is the *power* and the general welfare the *purpose* for which the power is to be exercised.

They are not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the U.S. and as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly no such universal power was meant to be given them. It was intended to lace them up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect. It is known that the very power now proposed as a means, was rejected as an end, by the Convention which formed the constitution. A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons of rejection urged in debate was that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on that subject adverse to the reception of the constitution.

2. The second general phrase is 'to make all laws necessary and proper for carrying into execution the enumerated powers.' But they can all be carried into execution without a bank. A bank therefore is not necessary, and consequently not authorised by this phrase.

It has been much urged that a bank will give great facility, or convenience in the collection of taxes. Suppose this were true: yet the constitution allows only the means which are 'necessary' not those which are merely 'convenient' for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for there is no one which ingenuity may not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase as before observed. Therefore it was that the constitution restrained them to the necessary means, that is to say, to those means without which the grant of the power would be nugatory.

But let us examine this convenience, and see what it is. The report on this subject, page 3. states the only general convenience to be the preventing the transportation and re-transportation of money between the states and the treasury. (For I pass over the increase of circulating medium ascribed to it as a merit, and which, according to my ideas of paper money is clearly a demerit.) Every state will have to pay a sum of tax-money into the treasury: and the treasury will have to pay, in every state, a part of the interest on the public debt, and salaries to the officers of government resident in that state. In most of the states there will still be a surplus of tax-money to come up to the seat of government for the officers residing there. The payments of interest and salary in each state may be made by treasury-orders on the state collector. This will take up the greater part of the money he has collected in his state, and consequently prevent the great mass of it from being drawn out of the state. If there be a balance of commerce in favour of that state against the one in which the government resides, the surplus of taxes will be remitted by the bills of exchange drawn for that commercial balance. And so it must be if there was a bank. But if there be no balance of commerce, either direct or circuitous, all the banks in the world could not bring up the surplus of taxes but in the form of money. Treasury orders then and bills of exchange may prevent the displacement of the main mass of the money collected, without the aid of any bank: and where these fail, it cannot be prevented even with that aid.

Perhaps indeed bank bills may be a more convenient vehicle than treasury orders. But a little difference in the degree of convenience, cannot constitute the necessity which the constitution makes the ground for assuming any non-enumerated power.

Besides; the existing banks will without a doubt, enter into arrangements for lending their agency: and the more favourable, as there will be a competition among them for it: whereas the bill delivers us up bound to the national bank, who are free to refuse all arrangement, but on their own terms, and the public not free, on such refusal, to employ any other bank. That of Philadelphia, I believe, now does this business, by their post-notes, which by an arrangement with the treasury, are paid by any state collector to whom they are presented. This expedient alone suffices to prevent the existence of that necessity which may

justify the assumption of a non-enumerated power as a means for carrying into effect an enumerated one. The thing may be done, and has been done, and well done without this assumption; therefore it does not stand on that degree of *necessity* which can honestly justify it.

It may be said that a bank, whose bills would have a currency all over the states, would be more convenient than one whose currency is limited to a single state. So it would be still more convenient that there should be a bank whose bills should have a currency all over the world. But it does not follow from this superior conveniency that there exists anywhere a power to establish such a bank; or that the world may not go on very well without it.

Can it be thought that the Constitution intended that for a shade or two of *convenience*, more or less, Congress should be authorised to break down the most antient and fundamental laws of the several states, such as those against Mortmain, the laws of alienage, the rules of descent, the acts of distribution, the laws of escheat and forfeiture, the laws of monopoly? Nothing but a necessity invincible by any other means, can justify such a prostration of laws which constitute the pillars of our whole system of jurisprudence. Will Congress be too strait-laced to carry the constitution into honest effect, unless they may pass over the foundation-laws of the state-governments for the slightest convenience to theirs?

The Negative of the President is the shield provided by the constitution to protect against the invasions of the legislature 1. the rights of the Executive 2. of the Judiciary 3. of the states and state legislatures. The present is the case of a right remaining exclusively with the states and is consequently one of those intended by the constitution to be placed under his protection.

It must be added however, that unless the President's mind on a view of every thing which is urged for and against this bill, is tolerably clear that it is unauthorised by the constitution, if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favour of their opinion. It is chiefly for cases where they are clearly misled by error, ambition, or interest, that the constitution has placed a check in the negative of the President.

TH: JEFFERSON
Feb. 15. 1791.

* Though the constitution controuls the laws of Mortmain so far as to permit Congress itself to hold lands for certain purposes, yet not so far as to permit them to communicate a similar right to other corporate bodies.

PrC (DLC); MS worn on right-hand edges and some parts of words are supplied from Tr (DLC: Washington Papers), which varies slightly in punctuation and capitalization. Entry in SJPL reads: "[Feb.] 15. Op[inio]n Th: J. on the Bank law.—Madison's speech on same subject." This would suggest that TJ enclosed Madison's argument against the constitutionality of the bank (see Madison, *Writings*, ed. Hunt, VI, 19–44).

Hamilton's creation of the Bank of the United States—one modelled on the Bank of England, privately directed but inseparably connected with government, capitalized largely on the pyramided public paper made possible by his funding and assumption measures, and believed by opponents to have been designed to support the special interests that controlled its policies—widened and deepened the partisan and sectional cleavage that had long since made its appearance within the government. Joseph Charles, *The origins of the American party system* (New York, 1961), p. 26, pointed out that historians had often concerned themselves with the impact of the bank bill on public opinion while neglecting to do so for the funding and assumption measures, which he regarded as the "first milestones in the growth of parties." There is still general agreement that "it was Madison's and Jefferson's opposition to the original charter [of the bank] that marked the birth" of the Republican party and that "Jefferson's attack on the constitutionality of the Bank and his enunciation of a narrow interpretation of the 'necessary and proper' clause of the Constitution became articles of faith in the Republican dogma" (Edward C. Carter, II, "The birth of a political economist: Mathew Carey and the recharter fight of 1810–1811," *Pennsylvania History*, XXXIII [July, 1966], 280; for variant opinions on the politics of the bank issue, see Mitchell, *Hamilton*, II, 86–108; Malone, *Jefferson*, II, 337–50; Brant, *Madison*, II, 327–33; Schachner, *Jefferson*, I, 416–22; Miller, *Hamilton*, p. 255–77; see also, Stuart Bruchey, "Alexander Hamilton and the State Banks, 1789 to 1795," *WMQ*, 3rd. ser., XXVII [July, 1970], 347–78, the best analysis of Hamilton's attempt to reconcile—under the broad rubric of the public interest—his conflicting views about rival banking systems chartered under federal and state authority; while just to Hamilton, Bruchey concludes that, in the

favoritism shown the Bank of New York, he “acted in ways that deserve to be questioned”; the definitive texts of Hamilton’s proposal of the bank and his defense of its constitutionality are presented by Syrett, *Hamilton*, VII, 237–42; VIII, 62–134). Leonard D. White, *The Federalists*, p. 223, concluded that the “first substantial break over public policy occurred ... when Jefferson declared Hamilton’s plan ... beyond the power of Congress to enact.”

But it must be emphasized, first of all, that the contest over the bank did not bring TJ and Hamilton into public view as protagonists of opposing views of public policy. Their opinions were solicited by the President in private and were not known to the contemporary public. Washington’s long delay in signing the bill did, of course, cause much anxiety on the part of Hamilton and others; Madison’s impassioned argument in the House of Representatives was a matter of public record; and the constitutional issue was discussed in the press (*Federal Gazette*, 21 Feb. 1791; *Va. Gazette* [Richmond], 16 Mch. 1791). Second, both Madison and TJ, as ardent and consistent nationalists, had frequently upheld the doctrine of implied or inherent powers advanced by Hamilton to defend the bank bill—Madison most conspicuously in *The Federalist* No. 44 and TJ most radically in arguing for a treaty that he considered beyond the powers of the Confederation (TJ to John Adams, 28 July 1785, enclosure; see also TJ’s opinion on the constitutionality of the Residence Act, Vol. 17: 197). This very fact, which implied that TJ and Madison were in effect arguing against themselves, obliged TJ also to question the necessity of a national bank since state-chartered institutions were in existence. Third, the constitutional issue was raised belatedly. While both TJ and Madison were undoubtedly disturbed about the tendency of Hamilton’s measures and resorted to a strict constructionist position to challenge that tendency, this was primarily a weapon of defense—a wholly inadequate one. Finally, though Washington’s doubts may not have been entirely resolved by Hamilton’s argument, there are grounds for supposing that southern—especially Virginia—opposition to a national bank chartered for twenty years rested on the suspicion that this was another means of keeping the government in Philadelphia (see Editorial Note to group of documents on the location of the Federal District, under 24 Jan. 1791).

Théophile Cazenove, representative of several Amsterdam firms, was not the only contemporary to observe a connection between the bank and the capital issues: “As those who desire that the seat of government be on the Potomac are united against the Bank, so the opposite party are united in its favor” (Cazenove to his principals, 5 Feb. 1791; Cazenove Letterbook). Fisher Ames declared that the “great point of difficulty was, the effect of the bank law to make the future removal of the government” from Philadelphia less likely. William L. Smith claimed that Virginians had indeed proposed “first by innuendo and finally in direct terms” that if the charter were limited to ten years the bill would be supported, but if not, the constitutional issue would be raised. “Had Pennsylvania acceded to the proposition, which the writer knows was made to this effect,” Smith declared, “much discussion and ill humor might have been spared, a prodigious deal of debate respecting the constitutionality of the law would have been avoided, and the painful agitation and disturbed state of mind for many days of a great character [Washington] would not have been excited” (Fisher Ames to George Roberts Minot, 17 Feb. 1791, Ames, *Works*, ed. Seth Ames, I, 95–6; [William L. Smith], *The politicks and views of a certain party displayed* [1792], p. 17; both quotations from Ames and Smith are drawn from an article by Kenneth R. Bowling, “The Bank Bill, the Capital City, and President Washington” (*Capitol Studies*, I [1972]). These observations scarcely did justice to the convictions of those who advanced the constitutional argument and Madison categorically denied Smith’s allegation about a proposition to limit the charter to ten years (Madison’s “Outline of an Answer to a Pamphlet,” 1792; DLC: Madison Papers, cited by Bowling). But there can be no doubt that political maneuvers in which both Washington and TJ were involved did connect the bank bill and the bill to amend the Residence Act (see note to group of documents on the location of the Federal District, under 24 Jan. 1791).

While the partisan and sectional cleavages were exacerbated by the bank issue, the first public break on a fundamental question of policy came with TJ’s remarkably blunt report on the whale and cod fisheries. This was a deliberate and conscious effort on his part to force the issue into the open after the lines had been drawn in private. It brought him and Hamilton on the stage as contestants, being none the less a confrontation because TJ was the challenger and Hamilton, confronted with a dilemma, was his silent and covert opponent. Its nature, if not its purpose, was obvious to the public. It therefore created something of a public sensation in a manner that the bank issue did not, for it reaffirmed policies on which there had once been general agreement but on which there was now partisan and sectional divergence. Hamilton had won a crowning victory with his bank bill,

but a costly one. He and his followers, at the moment of their triumph, were deeply concerned over the threat implicit in TJ's report and its legislative counterpart, Madison's navigation bill (see [Editorial Note to TJ's report on the fisheries, 1 Feb. 1791](#)). Fiscalism, victorious on the domestic scene, was now faced with a serious challenge on a basic question of foreign policy, one not confined to the interests of a special group but concerned with the welfare of the whole economy. Hamilton was well aware that this was less a moment for celebrating triumph than for being politically circumspect. For the challenge that had been made by TJ was issued with the approval of the President, Hamilton's very essential aegis.

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SOURCE PROJECT	Jefferson Papers
TITLE	Opinion on the Constitutionality of the Bill for Establishing a National Bank, 15 February 1791
AUTHOR	Jefferson, Thomas
RECIPIENT	Washington, George
DATE	15 February 1791
CITE AS	"Opinion on the Constitutionality of the Bill for Establishing a National Bank, 15 February 1791," <i>Founders Online</i> , National Archives, https://founders.archives.gov/documents/Jefferson/01-19-02-0051 . [Original source: <i>The Papers of Thomas Jefferson</i> , vol. 19, 24 January–31 March 1791, ed. Julian P. Boyd. Princeton: Princeton University Press, 1974, pp. 275–282.]

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